CHUNG KUM MOEY v. PUBLIC PROSECUTOR

[P.C. (Viscount Dilhorne, Lord Hodson & Lord Pearce) October 17, 1966]

[Privy Council Appeal No. 38 of 1965]

Penal Code ss. 299 & 300 — Murder — Culpable homicide — State of mind of accused when firing shots at deceased — Degree of certainty required to justify conviction of murder or culpable homicide — Difference between "likely" in s. 299, and the words in the third limb of s. 300.

Criminal Law and Procedure — Jury trial — Question of intent to murder not left to jury — Misdirection in summing up.

Criminal Law and Procedure — Appeal — Courts of Judicature Act, 1964, s. 60(1) proviso — No substantial miscarriage of justice — Test for application.

The appellant with two other men, entered a shop in Tanjong Katong Road, Singapore. He produced a revolver and told Chia Mui Song, its owner, to come out from behind the counter. Chia Mui Song did so and the appellant asked him for his keys and tried to search him. Chia Mui Song brushed his hands away and the appellant then fired a shot, in the direction of Chia Mui Song which hit him in the arm. After a struggle Chia Mui Song tried to get hold of the telephone which was on the counter behind which he had been sitting. The appellant fired again and Chia Mui Song died. Three bullets had struck his body and two on his right arm; one or both of these which went through his arm might have enterel his body, but there was no evidence to that effect. The appellant was tried before a jury and the trial judge in summing up, having explained the first, third and fourth limbs of section 300 of the Penal Code, said: "If you take the same view as myself, you will decide that the injuries to the chest and abdomen were not intentionally inflicted by the accused . . . the irresistible inference is that he had the knowledge that the act of shooting at the deceased's forearm was so imminently dangerous that it must in all probability cause death or bodily injury likely to cause death. . . . It seems to me, therefore, that the prosecution has established beyond reasonable doubt one of the states of mind required for the offence of murder. . . . Your main task is, therefore, to decide whether you fully accept the evidence . . . that it was the accused who fired the bullets which penetrated the deceased's chest and abdomen"; and just before the end of his summing up the learned trial judge said: "If you are fully satisfied on this point, that is, satisfied beyond reasonable doubt, you will find the accused guilty of murder." The appellant was convicted of murder and his conviction was upheld by the Federal Court (Barakbah C.J.; Malaya, Wylie C.J.; Borneo, and Tan Ah Tah J.) (February 22, 1965). By special leave in *forma pauperis* in an appeal to the Privy Council,

Held: (1) the four limbs of section 300 of the Penal Code were not mutually exclusive, and the words used by the trial judge near the end of his summing up, following as they did his firm expression of opinion that the appellant, if he fired the shots, had the state of mind necessary to constitute the offence of murder, might have led the jury to conclude that in substance the only issue for them was whether the accused fired the shots. That amounted to a misdirection and the conviction should not be allowed to stand;

(2) the contrast between the use of the words "likely to cause death" in section 299 and the words "sufficient in the ordinary course of nature to cause death" in the third limb of section 300 of the Penal Code indicated that a high degree of certainty was required to justify a conviction under that limb for murder. Where the question whether a case comes within the third limb of section 300 is in reality left to a jury it is difficult to envisage a case in which reference ought not to be made to the contrast in the words aforesaid and it is difficult to envisage a case in which it would not be right to leave the question of a verdict of culpable homicide to the jury. In this case although the trial judge did tell the jury that they had to consider the third limb of section 300 his direction was such as to amount to a direction that that part of section 300 did not apply;

(3) the proviso to section 60(1) of the Courts of Judicature Act, 1964 was not applicable, because it could not be said that a reasonable jury properly directed would inevitably have reached the conclusion that the person who fired the shot was guilty of murder because the learned judge who heard the evidence formed the view that the accused's intention was only to shoot the deceased in the forearm and their Lordships were therefore unable to exclude the possibility that a reasonable jury properly directed would have reached the same conclusion.

Cases referred to:—

(1) *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462, applied.

(2) *Stirland* v. *Director of Public Prosecutions* [1944] A.C. 315; [1944] 2 All E.R. 13 applied.

PRIVY COUNCIL.

Mark Littman Q.C. and *L. J. Blom-Cooper* for the appellant.

Montague Solomon for the respondent.

The judgment of their Lordships was delivered by,

Viscount Dilhorne: At about 6.50 p.m. on the 9th November 1963 three men entered a shop in Tanjong Katong Road, Singapore by the back door. There were then in the shop, its owner Chia Mui Song, his nephew Tan Peng Puan, three girls and two children. Tan Peng Puan was just about to leave the shop by the back door when the men came in. The leading man, identified by witnesses for the prosecution as the appellant, produced a revolver and told Tan Peng Puan to go back into the shop. The other two men were armed with knives. The appellant seized Tan Peng Puan's left arm and twisted it behind his back. He took Tan Peng Puan up to the counter in the shop behind which Chia Mui Song was sitting. The other two men attended to the other persons in the shop. According to Tan Peng Puan, the appellant told Chia Mui Song to come out from behind the counter. Chia Mui Song did so and stood by a table near by. The appellant asked him for his keys and tried to search him. Chia Mui Song brushed his hands away and the appellant then fired a shot, Tan Peng Puan testified, in the direction of Chia Mui Song which hit him in the arm. After this there was a struggle between Chia Mui Song and one of the two men who had come in with the appellant, over possession of a chair. Chia Mui Song let go of the chair and tried to get hold of the telephone which was on the counter behind which

he had been sitting. Tan Peng Puan said that when Chia Mui Song touched the telephone, the appellant fired again and Tan Peng Puan then saw Chia Mui Song hold his chest with his hands and collapse to the floor. After the shots were fired, the appellant and the other two men ran out of the back door of the shop. Chia Mui Song died.

Although the witnesses for the prosecution said that they only heard two shots fired, the post mortem examination of Chia Mui Song showed that more than that number must have been fired. The doctor who did the post mortem said that one bullet had entered the lower third of Chia Mui Song's right forearm and had emerged nearer the elbow. He said that another bullet had passed through his right forearm. A bullet had entered the right side of Chia Mui Song's chest high up and had gone through his heart. Another bullet had entered his right side directly below that one, in the region of the 8th rib. This had gone through his liver and into into the abdomen. In the doctor's opinion these two bullets had caused Chia Mui Song's death. Another bullet had grazed his back and gone through his left buttock. This bullet must have been fired when Chia Mui Song was sideways on to the appellant.

So, from the doctor's evidence, it appears that three bullets struck Chia Mui Song's body and two his right arm. One or both the shots which went through his right forearm may have entered his body but for that to have happened, and there was no evidence that it did, Chia Mui Song's right forearm must, when the shot was fired, have been in front of that part of his body into which the bullet entered so that the shot which was fired must have been aimed at his forearm and his body.

By a majority of five to two the jury returned a verdict of guilty of murder and the appellant was sentenced to death. The appellant had given evidence. He denied that he had been in the shop at all that evening. Whether the majority verdict was due to some members of the jury having doubts whether he was the man who fired the shots or doubts whether the shooting amounted to murder is not known.

The appellant appealed to the Federal Court of Malaysia. His appeal was dismissed and he now appeals by special leave.

Section 299 of the Penal Code of Singapore provides as follows:—

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

Section 300 reads as follows:—

"Except in the cases hereinafter excepted culpable homicide is murder —

Firstly — if the act by which the death is caused is done with the intention of causing death; or

Secondly — if it is done with the intention of causing such bodily injury as the offender knows is likely to cause the death of the person to whom the harm is caused; or

Thirdly — if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

Fourthly — if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such an act without any excuse for incurring the risk of causing death or such injury as aforesaid."

Where the trial is before a jury, it is for the jury to decide whether the accused had the knowledge or intention specified by section 300 as necessary to constitute the offence of murder.

In this case the learned judge began his summing-up by telling the jury that they had to decide all questions of fact, that they would give due consideration to any opinions expressed by him but that it was their duty to disregard them if they disagreed with them.

He then explained to them the first, third and fourth parts of section 300. He did not refer to the second part of that section.

After he had dealt with the burden of proof, he reviewed the evidence. He told them that in the light of the medical evidence they would have no difficulty in concluding that the two bullets which entered the deceased's chest caused his death and that the wounds they inflicted were sufficient in the ordinary course of nature to cause death.

He then turned to what he described as the main issue in the case, namely whether the accused had fired the shots which caused the deceased's death. Having reviewed the evidence on this, he told the jury that if they were satisfied beyond reasonable doubt that the accused had fired the shots which caused the deceased's death, they must go on to consider his state of mind at the time he shot the deceased.

The learned judge told them that the first question they had to decide was whether the accused intended to cause the deceased's death. With regard to this he said:—

"It seems to me a reasonable possibility that when he" (the accused) "fired the first shot he was trying to intimidate the deceased and make him hand over the keys. It also seems to me a reasonable possibility that when he fired the second and third shots he was aiming at the deceased's right forearm which had altogether four injuries and that his intention was only to prevent the deceased from telephoning to the police. If you take the same view, as myself, you will decide that there was no intention to cause death."

The learned judge then turned to the third part of section 300. Having earlier in his summing-up told the jury that they would have

no difficulty in concluding that the wounds in the deceased's body were sufficient in the ordinary course of nature to cause death, he expressed the opinion that it was a reasonable possibility that those wounds were not intended. He repeated that it seemed to him a reasonable possibility that the accused was aiming at the deceased's forearm with the intention of preventing the deceased from telephoning to the police and that the bullets entered the chest and abdomen of the deceased either after passing through or without passing through his right forearm. He said:—

"If you take the same view as myself, you will decide that the injuries to the chest and abdomen were not intentionally inflicted by the accused."

He thus directed them if they took the same view of the evidence as he did, not to find the accused guilty of murder under the third limb of section 300.

Tan Peng Puan said that the first shot had hit Chia Mui Song in the arm. The injuries suffered by the deceased showed that another shot had passed through his arm. Two shots must have been fired when the revolver was aimed at the deceased's chest. One or both of these may have passed through his forearm but if that happened, it must have happened when his forearm was in front of his body and the revolver aimed at the chest. Even if the accused had fired with the intention of preventing the deceased telephoning the police, that does not exclude an intention to kill or to cause bodily injury sufficient in the ordinary course of nature to cause death.

The learned judge appears to have assumed that the jury would also take the view that it was a reasonable possibility that the accused had only intended to hit the deceased in the arm. He did not tell them that if they disagreed with his view and were satisfied beyond reasonable doubt that the shots fired at close range into the deceased's body could only have been fired with the intention of killing or of inflicting such bodily injury as would in the ordinary course of nature cause death, they were entitled to return a verdict of guilty. If it was to be inferred from the fact that the first shot entered the deceased's arm, that it was then the accused's intention only to hit the arm, he did not point out that it did not necessarily follow that the second and third shots had been fired with the same intention or refer to the possibility that one or both the shots which entered his chest had gone through the deceased's forearm as a result of the deceased putting his arm in front of his chest, when the shot was fired.

The judge then went on to tell the jury that they had to consider whether the accused knew that his act in aiming at the forearm was so imminently dangerous that it must in all probability cause death or bodily injury likely to cause death. He then said:—

"To my mind it seems impossible to believe that the accused did not have such knowledge. It seems that one cannot possibly entertain any doubt as to the existence of such knowledge in the mind of the accused. . . . It seems to me that as far as the state of mind of the accused is concerned, the irresistible inference is that he had the knowledge that the act of shooting at the deceased's forearm was so imminently dangerous that it must in all probability cause death or bodily injury likely to cause death. . . . It seems to me, therefore, that the prosecution has established beyond reasonable doubt one of the states of mind required for the offence of murder."

Complaint was made on behalf of the appellant that the judge failed to leave to the jury the vital question whether the appellant, if he fired the fatal shots, had any of the states of mind necessary to constitute the crime of murder. If his direction with regard to the first and third parts of section 300 based on the hypothesis, unsupported by any evidence, that the shots were fired with the intention of only hitting the deceased in the forearm was unduly favourable to the accused, his direction with regard to the fourth part really amounted to taking the issue away from the jury.

In their Lordships' view it was unfortunate that the learned judge gave expression to his views in the way he did. Although he told the jury that it was for them to consider what was the accused's state of mind, he only gave them his own views as to that. He did not put before them other possible views for their consideration and he expressed the conclusion that it was an irresistible inference that the accused had knowledge that shooting at the deceased's forearm was so imminently dangerous that it must in all probability cause death or bodily injury likely to cause death. The jury might have taken the view that shooting at the deceased's forearm was not of itself likely to cause death or such a bodily injury, or if it was, that the accused did not know it. Whether the act done by the accused was of this character was a matter for the jury to consider and to decide.

The learned judge appears to have proceeded on the basis that the four limbs of section 300 are mutually exclusive. That would not appear to be the case. For instance, an act may be done with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death and also with the knowledge that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.

The passage quoted above from the summing-up was followed by the judge saying:—

"Your main task is, therefore, to decide whether you fully accept the evidence of Tan Peng Puan and Goh Ah Hong that it was the accused who fired the bullets which penetrated the deceased's chest and abdomen. *If you are fully satisfied on this point, that is, satisfied beyond reasonable doubt, you will find the accused guilty of murder.*"

The words in italics were said by the judge near the end of his summing-up and following as they did the judge's firm expression of opinion that the accused, if he fired the shots, had the state of mind necessary to constitute the offence of murder, they may have led the jury to conclude that in substance the only issue for them was whether the accused fired the shots.

In their Lordships' view this amounted to a misdirection of such a character that the conviction cannot be allowed to stand.

Two further grounds were put forward on behalf of the appellant. It was argued that the learned judge was wrong in not leaving the offence of culpable homicide to the jury. If the act causing death is done with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death, it comes within the third limb of section 300 and the offence is murder. If the act is done with the intention of causing bodily injury likely to cause death and it is not shown that the accused knew that that was the likely consequence, it is culpable homicide. It is not possible to define with precision the meaning to be given to the word "likely" but the contrast between the use of that word in section 299 and the words in the third limb of section 300 indicates that a higher degree of certainty is required to justify conviction under that limb for murder. In this case although the judge did tell the jury that they had to consider the third part of section 300, his direction was such as to amount to a direction that that part of section 300 did not apply. Where the question whether a case comes within this part of section 300 is in reality left to a jury, it is difficult to envisage a case in which reference ought not to be made to section 299 and to the contrast between the word "likely" in that section and the words "sufficient in the ordinary course of nature" in section 300, and it is also difficult to envisage a case in which it would not be right to leave the question of a verdict of culpable homicide to the jury.

The third ground of appeal was with regard to the cross-examination to which the accused was subjected. While some criticism can properly be made of that, it is not of such a character that in their Lordships' view it would be right to quash the conviction on this ground.

Their Lordships were invited to dismiss the appeal on the ground that no substantial miscarriage of justice had occurred. By the proviso to section 60(1) of the Courts of Judicature Act 1964 the Federal Court is given power to take that course notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant if it considers that no substantial miscarriage of justice has occurred.

In *Woolmington* v. *Director of Prosecutions* [1] Lord Sankey L.C. said at p. 482 in relation to the similar provision in the Criminal Appeal Act 1907 that the test was whether "if the jury had been properly directed they would inevitably have come to the same conclusion." In *Stirland* v. *Director of Prosecutions* [2] Lord Simon at p. 321 said that the provision assumed "a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict."

On the simple facts of this case it might well be said that a reasonable jury properly directed would inevitably and without doubt have reached the conclusion that the person who fired the shots was guilty of murder. Their Lordships cannot, however, disregard the fact that the learned judge who heard the evidence formed the view that the accused's intention was only to shoot the deceased in the forearm. They are unable therefore to exclude the possibility that a reasonable jury properly directed would have reached the same conclusion, and, if it had, the possibility that it would not have concluded that the accused knew that the shots at the deceased's forearm were so imminently dangerous that they must in all probability cause death or such bodily injury as was likely to cause death or that the injury intended was sufficient in the ordinary course of nature to cause death. Their Lordships are therefore unable to apply the proviso.

On any view of the evidence the appellant was guilty of culpable homicide.

For the reasons stated their Lordships allowed the appeal and set aside the verdict of guilty of murder and quashed the sentence of death passed on the appellant and substituted therefor a verdict of guilty of culpable homicide and a sentence of imprisonment for life.

Appeal allowed.

Solicitors: *Speechly, Mumford & Soames; Stephenson Harwood & Tatham.*

ALAGAPPA CHETTIAR v. PALANIVELPILLAI & ORS.

[O.C.J. (Raja Azlan Shah J.) November 26, 1966]

[K.L. — Civil Suit No. 1024 of 1966]

Arbitration — Arbitration Ordinance, 1950, s. 5 — Requirements to satisfy court — Onus of party wanting to keep out of arbitration — Subsequent agreement not covered by arbitration clause.

Landlord and Tenant — Breach of covenant to keep in repair — Standard rent of controlled premises.

The plaintiff was the trustee of rent-controlled premises of which the defendants, trustees of a Hindu temple, were statutory tenants. Under a lease and a subsequent agreement the defendants' predecessors had covenanted with the plaintiff's predecessors to keep the premises in good and tenantable condition and to paint and white-wash the said premises from time to time and when appropriate. In February 1965 the defendants